A

TENAGA NASIONAL BHD v. EVERGROWTH AQUACULTURE SDN BHD

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
ANANTHAM KASINATHER JCA
B DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: W-02(NCvC)(W)-284-01-2013]
25 AUGUST 2016

C ***UTILITIES:*** *Electricity – Damages – Aggravated damages – Claim by electricity supply provider for losses resulting from meter-tampering – Whether aggravated damages pleaded in statement of claim – Whether trial judge has discretion to award aggravated damages – Whether calculation for damages to be assessed correct*

D ***UTILITIES:*** *Electricity – Inspection – Procedure to inspect premises – Officers of electricity supply provider entered consumer's premises at 5am – Whether reasonable time to conduct inspection – Whether procedure for inspection complied with – Whether there was warrant by Magistrate – Whether police officers present were Inspector or above rank of Inspector – Whether meter-tampering proved – Electricity Supply Act 1990, ss. 4A, 5(2), 37 & 38 – Licensee Supply Regulations 1990, reg. 7*

E ***UTILITIES:*** *Electricity – Electricity supply provider – Contractual relationship between electricity supply provider and customers – Whether regulator or enforcer – Permission to do certain acts consistent with role as electricity supply provider – Entry into consumer's premises – Whether reg. 7 of Licensee Supply Regulations 1990 permit any activity of enforcement or ambush*

F The appellant ('the plaintiff') supplied electricity to the respondent's ('the defendant') premises. The plaintiff's officers entered the defendant's premises at 5am and after conducting an inspection, the officers discovered that there was meter-tampering. The plaintiff demanded for alleged loss of revenue and expenses incurred in conducting the pre-dawn operation totalling to the sum G of RM1,662,261.26. When the defendant failed to pay the sum, the plaintiff commenced a claim at the High Court. The defendant counterclaimed, submitting that the plaintiff's servants had trespassed into the defendant's premises and assaulted the defendant's workers. In allowing the plaintiff's claim and dismissing the defendant's counterclaim, the Judicial H Commissioner ('the JC') made the orders that (i) general damages be assessed for losses sustained by the plaintiff; and (ii) the defendant pay RM200,000 to the plaintiff as exemplary damages. Aggrieved by the decision of the High Court, (i) the plaintiff appealed against the period for assessment and the damages to be assessed; while (ii) the defendant appealed against the dismissal of its counterclaim. The defendant submitted that (i) the order for I

aggravated damages against the defendant was wrong as it was not pleaded; and (ii) the order for damages to be assessed was also erroneous as there was no tampering and the inspection by the plaintiff was conducted illegally. On the contrary, the plaintiff argued that (i) although the aggravated damages were not pleaded, the JC had a discretion to award the same; (ii) there was tampering as a worker was seen running to remove a clamp; and (iii) the plaintiff's servants could enter premises under reg. 7 of the Licensee Supply Regulations 1990 ('the Regulations') read with s. 38 of the Electricity Supply Act 1990 ('the Act').

Held (dismissing plaintiff's appeal; allowing defendant's cross appeal in part)

Per Zaharah Ibrahim JCA delivering the judgment of the court:

(1) There was no basis for the JC to award aggravated damages. The plaintiff's claim was for pure loss of revenue as a result of tampering of the meter. The orders made for damages to be assessed and aggravated damages were without basis and must be set aside. (paras 36, 67 & 68)

(2) The only evidence that the meter was tampered with was the evidence of PW1 who claimed to have seen someone running to the meter and the evidence of PW2 that there was a clamp attached to the meter. According to PW2, any removal or re-affixing of the sticker would be detectable. However, there was no evidence led to show any sign of the removal and affixing of the sticker on the meter during previous inspections after the sticker had been fixed on the meter. (paras 38 & 43)

(3) There was no sound basis used for the back billing. There were many instances of 'guesswork' in the evidence of the plaintiff's witnesses used as a basis for the back billing. When the business activity of a consumer involves possibilities of different levels of electricity usage at different periods of time, it would be gross injustice to automatically assume that any drop in electricity usage was the result of electricity 'theft'. (paras 47 & 49)

(4) The detection of the commission of offences under the Act, including offences under s. 37, have been expressly conferred by the Act on the persons clearly set out in the Act. These persons do not include officers of a licensee or officers authorised by a licensee. Section 4A of the Act empowers the Minister to authorise any public officer or officer of the Commission to exercise the powers of enforcement under the Act. These authorised officers and police officers not below the rank of Inspector are the only persons authorised by the Act to perform enforcement functions. Furthermore, sub-s. 5(2) of the Act makes it clear that for entry into premises other than at a reasonable time, even by these

enforcement officers, a warrant issued by a Magistrate is required. It was not in dispute that the entry into the defendant's premises was done without a warrant from a Magistrate and the police officers present were auxiliary policemen and none of them was of the rank of Inspector or above. (paras 53, 59, 60 & 61)

(5) The plaintiff was a licensee under the Act. It was neither a regulator nor an enforcer. Its relationship with its customers was based on a contract. Apart from the contractual rights, it was given permission and not power to do certain acts consistent with its role as an electricity supply provider such as the ability under reg. 7 of the Regulations to enter premises to which supply is given by it 'at all reasonable times'. The entry into a consumer's premises in the wee hours of the morning when no operational activity was going on was clearly not entry at a reasonable time. Regulation 7 of the Regulations did not and was clearly not intended to permit any activity of enforcement or 'ambush'. It merely authorised an officer of a licensee to enter a consumer's premises to: (i) inspect any supply line or electrical equipment belonging to the licensee; (ii) ascertain the reading registered by any electricity meter installed in the premises; and (iii) remove, inspect or re-install any electricity meter or to install a substitute meter. (paras 55, 57 & 58)

(6) Given the clear provisions of the Act on powers of enforcement and persons who can exercise such powers of enforcement, reg. 7 of the Regulations, being subsidiary legislation, could not possibly be interpreted to allow officers authorised by a licensee to conduct a pre-dawn 'ambush' of the defendant's premises. Overtime charges and other expenses for the pre-dawn inspection were included in the amount claimed. However, the pre-dawn inspection by the plaintiff's officers was clearly not permitted by the Act. Therefore, any claim for expenses involved in conducting the inspection would be contrary to the intention of the Act and *ultra vires* the Act. (paras 62, 64 & 65)

Bahasa Malaysia *Headnotes*

Perayu ('plaintif') membekalkan elektrik kepada premis responden ('defendan'). Pegawai-pegawai plaintif masuk ke premis defendan pada pukul 5 pagi dan selepas menjalankan pemeriksaan, pegawai-pegawainya mendapati berlaku usikan pada meter. Plaintif menuntut kerugian hasil dan perbelanjaan yang dikatakan dikeluarkan untuk menjalankan operasi sebelum subuh berjumlah RM1,662,261.26. Apabila defendan gagal membayar jumlah tersebut, plaintif memulakan tuntutan di Mahkamah Tinggi. Defendan menuntut balas dengan menghujahkan kakitangan plaintif menceroboh masuk premis defendan dan menyerang pekerja defendan. Dalam membenarkan tuntutan plaintif dan menolak tuntutan balas defendan,

Pesuruhjaya Kehakiman ('PK') memerintahkan (i) taksiran ganti rugi am bagi kerugian plaintif; dan (ii) defendan membayar ganti rugi teruk sebanyak RM200,000 kepada plaintif. Terkilan dengan keputusan Mahkamah Tinggi, (i) plaintif merayu terhadap tempoh taksiran dan ganti rugi yang ditaksir; manakala (ii) defendan merayu terhadap penolakan tuntutan balasnya. Defendan menghujahkan (i) perintah ganti rugi teruk terhadapnya adalah salah kerana tidak diplidkan; dan (ii) perintah ganti rugi yang ditaksir juga satu kekhilafan kerana tiada usikan dan pemeriksaan oleh plaintif dijalankan secara salah. Sebaliknya, plaintif menghujahkan (i) walaupun ganti rugi teruk tidak diplidkan, PK mempunyai budi bicara mengawardkannya; (ii) berlaku usikan kerana seorang pekerja dilihat berlari untuk mencabut pengapit; dan (iii) kakitangan plaintif boleh memasuki premis bawah peraturan 7 Peraturan Bekalan Pemegang Lesen 1990 ('Peraturan') dibaca bersama-sama dengan s. 38 Akta Bekalan Elektrik 1990 ('Akta').

Diputuskan (menolak rayuan plaintif; membenarkan sebahagian tuntutan balas defendan)
Oleh Zaharah Ibrahim HMR menyampaikan penghakiman mahkamah:

(1) Tiada asas bagi PK untuk mengawardkan ganti rugi teruk. Tuntutan plaintif adalah semata-mata bagi kerugian hasil, akibat usikan pada meter. Perintah bagi taksiran ganti rugi dan ganti rugi teruk tidak berasas dan mesti diketepikan.

(2) Satu-satunya keterangan bahawa meter diusik adalah keterangan PW1 yang mendakwa melihat seseorang berlari ke meter dan keterangan PW2 bahawa terdapat pengapit pada meter. Menurut PW2, penanggalan atau tampalan semula pelekat boleh dikesan. Walau bagaimanapun, tiada keterangan yang dikemukakan untuk menunjukkan apa-apa tanda penanggalan atau tampalan pelekat pada meter semasa pemeriksaan terdahulu selepas pelekat dilekatkan pada meter.

(3) Tiada asas kukuh yang menyokong bil kebelakang. Banyak tekaan dalam keterangan saksi-saksi plaintif yang digunakan sebagai asas menyokong bil kebelakang. Apabila aktiviti perniagaan pengguna melibatkan kemungkinan tahap penggunaan elektrik yang berbeza pada tempoh-tempoh berbeza, tidak adil sama sekali untuk serta merta menganggap kekurangan penggunaan elektrik adalah akibat curian elektrik.

(4) Pengesanan pelakuan kesalahan bawah Akta, termasuk kesalahan bawah s. 37, dinyatakan dengan jelas oleh Akta tentang orang-orang yang digariskan dalam Akta. Orang-orang ini tidak termasuk pegawai-pegawai atau pemegang lesen atau pegawai yang diberi kuasa oleh pemegang lesen. Seksyen 4A Akta memberi kuasa kepada Menteri untuk memberi kuasa kepada mana-mana pegawai awam atau pegawai Suruhanjaya untuk menjalankan kuasa pelaksanaan bawah Akta. Pegawai-pegawai

dan pegawai polis bertaraf tidak kurang daripada Inspektor adalah orang-orang yang diberi kuasa menjalankan fungsi penguatkuasa. Tambahan lagi, sub-s. 5(2) Akta memperuntukkan dengan jelas bahawa kemasukan ke dalam premis bukan pada masa yang munasabah, walaupun oleh pegawai-pegawai penguatkuasa, memerlukan waran oleh Majistret. Tidak dinafikan kemasukan ke dalam premis defendan adalah tanpa waran oleh Majistret dan pihak polis yang hadir adalah polis sampingan dan tidak seorang pun yang berpangkat Inspektor atau lebih tinggi.

(5) Plaintif adalah pemegang lesen bawah Akta. Plaintif bukan pengatur mahupun penguatkuasa. Hubungan plaintif dengan pelanggan berasaskan kontrak. Selain hak-hak kontraktual, plaintif diberi kebenaran, dan bukan kuasa, mengambil beberapa tindakan selaras dengan peranannya sebagai pembekal bekalan elektrik seperti kebolehannya bawah peraturan 7 Peraturan untuk memasuki premis yang dibekalkan pada masa-masa munasabah. Kemasukan ke dalam premis pelanggan pada awal pagi ketika tiada aktiviti operasi jelas bukan masa munasabah. Peraturan 7 Peraturan tidak dan jelas tidak dimaksudkan untuk membenarkan apa-apa aktiviti penguatkuasaan atau serang hendap. Peraturan ini sekadar memberi kuasa kepada pegawai pemegang lesen untuk memasuki premis pelanggan untuk: (i) memeriksa mana-mana pepasangan bekalan atau peralatan elektrik milik pemegang lesen; (ii) mengenal pasti bacaan berdaftar oleh mana-mana meter elektrik yang dipasang di premis; dan (iii) mencabut, memeriksa atau memasang semula mana-mana meter elektrik atau memasang meter gantian.

(6) Memandangkan peruntukan tentang kuasa atau penguatkuasaan dan orang-orang yang boleh menjalankan kuasa pelaksanaan adalah jelas, peraturan 7 Peraturan, sebagai perundangan subsidiari, tidak mungkin boleh ditafsir untuk membenarkan pegawai-pegawai yang diberi kuasa oleh pemegang lesen untuk menjalankan serang hendap sebelum subuh terhadap premis defendan. Caj lebih masa dan lain-lain perbelanjaan bagi pemeriksaan sebelum subuh turut dimasukkan dalam jumlah yang dituntut. Walau bagaimanapun, pemeriksaan sebelum subuh oleh pegawai-pegawai plaintif jelas tidak dibenarkan oleh Akta. Dengan itu, apa-apa tuntutan bagi perbelanjaan yang terlibat dalam penjalanan pemeriksaan adalah bertentangan dengan niat Akta dan *ultra vires* Akta.

Case(s) referred to:
Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd [2006] 4 CLJ 892 CA ***(refd)***

Legislation referred to:
Electricity Supply Act 1990, ss. 4A, 5(2), 37(6), (7), 38(3), (4)
Licensee Supply Regulations 1990, reg. 7
Rules of the Court of Appeal 1994, r. 8

For the appellant/plaintiff - David Mathew, Mohd Nor Mahmud & Hadi Mukhlis; M/s Mohamed Noor, Amran & Yoon
For the respondent/defendant - Jack Yeow; M/s Rahmat Lim & Partners

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: 22NCVC-250-03-2012 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Zaharah Ibrahim JCA:

Introduction

[1] This was an appeal by the plaintiff against the High Court decision ordering damages for the period from 1 June 2010 until 26 August 2010 only and for such damages to be assessed.

[2] The defendant, in turn, cross-appealed seeking to have the order for damages varied by having them set aside.

[3] For ease of reference, in this judgment the parties will be referred to as they were in the High Court.

Background Facts

[4] The plaintiff was a service provider under the Electricity Supply Act 1990 ("Act 447"). It supplied electricity to the premises at No. 2 Fasa 8 Mukim Api-api, Kampung Asam Jawa, 47500 Kuala Selangor where the defendant operated a prawn farm ("defendant's premises").

[5] Before dawn on 26 August 2010 (about 5 o'clock in the morning), the plaintiff's officers entered the defendant's premises and conducted an inspection of the defendant's premises and claimed to have discovered tampering of the meter by the use of a clamp. A police report was lodged.

[6] The plaintiff claimed that as a result of the tampering, the meter failed to record the actual usage of electricity at the defendant's premises, and made a demand for the shortfall ("back billing") as well as the expenses incurred in conducting the pre-dawn operation. A legal demand was made by the plaintiff through its solicitors by notice of demand dated 8 November 2011 for the sum of RM1,662,261.26.

[7] The amount claimed by the plaintiff was for alleged loss of revenue from 26 September 2005 until 26 August 2010 as well as for the expenses incurred in conducting the pre-dawn operation.

[8] When the defendant failed to pay the amount claimed, the plaintiff filed this suit on 27 February 2012.

A **In The High Court**

The Claim And Counterclaim

[9] In its statement of claim, the plaintiff stated that during its inspection of the meter at the defendant's premises at 5am on 26 August 2010 they found evidence of tampering of the meter and lodged a police report.

B

[10] The plaintiff claimed that as a result of the tampering, the meter could not function properly and failed to record accurately the amount of electricity actually supplied to the defendant's premises and as a result the amount on the electricity bill served on the defendant each month was lower than what it should actually be.

C

[11] The plaintiff's calculation showed that it had under-billed the defendant. It claimed that inclusive of the costs of the pre-dawn operation conducted by the plaintiff on 26 August 2010 the defendant owed the plaintiff RM1,662,261.26.

D

[12] The plaintiff claimed the following reliefs:

(a) Jumlah terhutang sebanyak RM 1,662,261.26;

(b) Faedah atas jumlah RM 1,662,261.26 pada kadar 4% setahun dikira dari tarikh penghakiman sehingga penyelesaian sepenuhnya;

E

(c) Kos atas dasar peguamcara-anakguam;

(d) Kos tindakan ini; dan

(e) Apa-apa relif yang difikirkan patut dan suaimanfaat oleh Mahkamah ini.

F

[13] The defendant filed a counterclaim claiming that the plaintiff's servants had trespassed onto the defendant's premises and had assaulted the defendant's workers causing injuries to them such that one of them had, in fact, damaged his hearing. A police report was lodged on the incident.

The Evidence

G

[14] The evidence adduced during trial was that the inspection of the defendant's premises was conducted about 5am on 26 August 2010 by a team of the plaintiff's officers, including PW1 and PW2, and the plaintiff's auxiliary police personnel.

H

[15] PW1 and PW2 claimed to have discovered a clamp being affixed to the test terminal block (TTB) at the electricity meter in the meter room inside the defendant's premises. They then checked the meter and found a discrepancy in the reading of the meter.

I

[16] Based on that search, calculations were made by PW3 who calculated the amount of the shortfall from 26 September 2005 as there was a sudden drop in electricity usage by the defendant then.

[17] By letter dated 10 January 2011 signed by one Mohd Nazri bin Puteh, the area manager (Kuala Selangor) of the plaintiff's distribution division, the plaintiff notified the defendant that the plaintiff had evidence that the meter was not recording the actual usage of electricity at the defendant's premises and the amount of shortfall was RM1,662,261.26. The defendant was given 14 days from the date of the letter to pay the full amount, failing which supply of electricity to the defendant's premises would be disconnected.

[18] By a letter dated 6 May 2011 signed by one Zahrul Effendy bin Shahid, the Assistant Manager of Consumer and Marketing for the area of Kuala Selangor for and on behalf of the Area Manager for Kuala Selangor, the plaintiff made a demand under sub-s. 38(3) of Act 447 for the sum of RM1,662,261.26 to be paid within seven days of the date of the letter, failing which supply would be disconnected. This letter was the plaintiff's written statement under sub-s. 38(4) of Act 447 ("written statement").

[19] The plaintiff's solicitors subsequently issued a legal notice of demand dated 8 November 2011 demanding the payment of the sum of RM1,662,261.26 within 14 days from the date of the letter, failing which legal proceedings would be instituted.

[20] The defendant adduced evidence through DW1, who was one of its directors. DW1 denied the tampering of the meter and denied that a clamp was used on the TTB.

[21] DW1 explained at great length the reasons for the drop in electricity usage in some months. According to him, the prawns were infected with the white spot virus and had to be harvested prematurely. The affected ponds were left fallow and hence the usage of the paddles was reduced. This meant that less electricity was used. He claimed that the defendant had in fact on several occasions invited the plaintiff's representatives to see the fallow ponds but the plaintiff did not visit the prawn farm.

The High Court Decision

[22] The learned Judicial Commissioner found that tampering was proved by the plaintiff, and allowed the plaintiff's claim. The learned Judicial Commissioner made the following orders (as set out in the grounds of judgment):

> a. that the Plaintiff's claim is allowed and that general damages be assessed for losses sustained by the Plaintiff for the period beginning 1.6.2010 till 26.8.2010;

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b. that the Defendant pay the sum of RM200,000.00 to the Plaintiff as exemplary damages;

c. that interest on the damages be at 4% per annum on the judgement sum from the date of filing of the Writ;

d. that the Defendant's counterclaim be dismissed; and

B
e. the costs for the claim and counterclaim be fixed at RM45,000.00.

[23] The plaintiff was aggrieved by the orders of the High Court that damages be allowed for the period between 1 June 2010 until 26 August 2010 only and for those damages to be assessed. It filed an appeal to this C court against those orders.

[24] The defendant was aggrieved by the High Court decision dismissing its counterclaim and the award of damages and aggravated damages and cross-appealed.

D
The Appeal And Cross Appeal

[25] During the hearing of the appeal before us, no issue was taken by the plaintiff, either at the first date when the appeal came up for hearing (and adjourned when the plaintiff's counsel claimed to have no knowledge of the cross-appeal), or at the subsequent date when the appeal and cross-appeal E were heard, on the procedural propriety of the cross-appeal.

[26] We decided to hear the defendant's submissions on the cross-appeal first before hearing the plaintiff's submissions on the main appeal, as the issue of the correctness of the High Court order on damages was the central issue in the appeal and the cross-appeal.

F
Submissions

[27] It was submitted for the defendant that the order for aggravated damages against the defendant was wrong as it was not pleaded and in any case, this was a claim in contract, not tort.

G **[28]** The defendant also submitted that the order for damages to be assessed was also erroneous as there was, in fact, no tampering and the inspection by the plaintiff was illegally done. The calculation for the loss of revenue was also done contrary to the method published by the plaintiff on its website. Further, the defendant had explained the reasons for the variations in the H meter readings of the electricity supplied to the defendant's premises.

[29] The defendant submitted that a substantial part of the plaintiff's claim was barred by limitation.

[30] For the plaintiff, it was submitted that there was tampering as was I shown when the reading dropped and when a worker was seen running to remove the clamp.

[31] On the alleged illegal entry, learned counsel for the plaintiff referred to the case of *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd* [2006] 4 CLJ 892 as authority for his submission that the plaintiff's servants could enter premises under reg. 7 of the Licensee Supply Regulations 1990 read with s. 38 of Act 447.

[32] On the calculations for the loss of revenue, learned counsel for the plaintiff submitted that the plaintiff was not obliged to use any particular method for the calculation. It was also submitted that the defendant had failed to produce evidence to rebut the *prima facie* evidence of the unrecorded usage of electricity translated into the amount claimed in written statement.

[33] On the order for aggravated damages, learned counsel for the plaintiff conceded that it was not pleaded, but submitted that the learned Judicial Commissioner had a discretion to award it.

Analysis

Cross-Appeal On The Counterclaim

[34] We were of the considered view that r. 8 of the Rules of the Court of Appeal 1994 allowed only a variation of an order made by the High Court. As the defendant did not file an appeal against the dismissal of its counterclaim, we were of the considered view that the cross-appeal on the counterclaim was contrary to the provisions of the rule and we therefore dismissed that part of the cross-appeal.

Aggravated Damages

[35] Learned counsel for the plaintiff conceded that the plaintiff did not claim for aggravated damages in its statement of claim.

[36] In out considered view, there was no basis for the learned Judicial Commissioner to award aggravated damages against the defendant. The plaintiff's claim was a claim for pure loss of revenue as a result of the tampering of the meter.

[37] We agreed with the defendant that given the circumstances of the inspection at the defendant's premises, if aggravated damages were at all warranted, it would have been in the defendant's favour.

Loss Of Revenue – Back Billing

[38] From the terms of the order of the High Court as set out above, the learned Judicial Commissioner obviously, in our considered view, accepted the evidence that showed that the only evidence that the meter was tampered with was the evidence of PW1 who claimed to have seen someone running to the meter, and the evidence of PW2 that there was a clamp attached to the TTB. This happened on 26 August 2010.

[39] There was evidence that the meter was inspected on 1 June 2010 and nothing untoward was seen or detected during that inspection. Any tampering could have only occurred after the inspection on 1 June 2010.

[40] PW2 and PW3, in particular, attempted to explain that the clamp could be fixed and removed at will without leaving any trace. However, the clear evidence of PW2 was that:

> A: Untuk 1.6.2010, pemeriksaan dilakukan tetapi didapati meter dalam keadaan baiklah. Dan pada procedur biasa jika tidak ada apa masalah pada pepasangan TNB, mereka tidak akan membuat tindakan susulan untuk filing dan pengiraan semula sebab meter yang sedia ada dicheck itu tidak ada masalah.

[41] PW1 was the person who was first at the location of the TTB during the pre-dawn inspection. During PW1's cross-examination, the following exchange was recorded:

> Q71: From the bottom, my Lord. Terdapat itu pelekat ya, pelekat pada TTB di mana terdapat tulisan 26 Ogos 10. Ini yang dipanggil pelekat, ya?
>
> A: Mm.
>
> Q72: Apakah fungsi pelekat ini?
>
> A: Ini adalah sticker keselamatan bagi pihak TNB. Semasa saya letakkan di sini, dan saya tulis di sini 26 haribulan 8 2010. Ok, bermakna, sticker ini tidak boleh diganggu.
>
> Q73: Tidak boleh diganggu kan?
>
> A: Ya sebab sticker di sini pun ada menerangkan tentang akta-akta di sini lah. Ada keterangan di sticker ini.
>
> Q74: Jadi adakah betul bahawa setelah setiap pemeriksaan terdapat satu sticker sebegini dilekatkan pada bahagian TTB dan ada tulisan tarikh pemeriksaan.
>
> A: Boleh ulang balik?
>
> Q75: Adakah lazimnya setelah setiap pemeriksaan, satu sticker sebegini dilekatkan pada TTB tersebut dengan tarikh pemeriksaan ditulis pada sticker tersebut?
>
> A: Setiap kali kita orang periksa, sticker ini digunakan untuk kes kecurian arus sahaja.
>
> Q76: Oh kecurian arus.
>
> A: Ya.
>
> Q77: Then fungsi sticker ini? Adakah untuk menghalang clamp daripada dimasukkan?

A: Ya.

Q78: Untuk penjelasan saya sendiri, jadi jika terdapat kemasukkan clamp melalui sticker ini, then Tenaga akan tahu bahawa sticker ini telah diganggu kerana clamp telah dimasukkan dan memecahkan sticker tersebut. Betul tak? Di belakang sticker ini ada satu lubang kan?

A: Ya, betul.

Q79: Dan clamp dimasukkan melalui lubang tersebut kan?

A: Ya.

Q80: Clamp dimasukkan melalui lubang tersebut jadi sticker ini adalah untuk menghalang clamp daripada dimasukkan. Jika mereka masukkan clamp dan keluarkan balik, then terdapat satu lubangkan pada pelekat.

A: Sticker ini akan koyak.

Q81: Ah. Akan koyaklah.

A: Akan koyak.

Q82: Jadi jika anak guam saya ingin memasukkan clamp semula, lain kali bila Tenaga masuk buat pemeriksaan, Tenaga boleh nampak sticker sudah koyakkan kerana clamp telah dimasukkan. So, sticker adalah untuk menghalang Defendan daripada memasukkan clamp, betul?

A: Ya.

[42] PW1's evidence during re-examination was that if there was indeed any tampering with the meter there would be traces of that which could be detected by the plaintiff's officers/servants:

Q23: Tadi peguam ada tanya Encik Nazmi, berkenaan dengan sticker. Soalan saya, boleh tak clamp ini dimasukkan tanpa mengganggu sticker

A: Boleh juga. Dia akan buka perlahan-lahan, ataupun buka slow. Memang boleh dan dia akan selit di …

Q24: Boleh buka sticker itu perlahan-lahan …

A: Ya.

Q25: Dan masukkan…

A: **Tetapi dia akan ada kesan lah. Kita akan nampak kesan bukaan itu di hujung sticker itu. Memang akan nampak kesan bukaan dan kesan tutup balik. Di situlah kita akan tahu.** (emphasis added)

[43] In other words, any removal and re-affixing of the sticker would be detectable. Yet there was no evidence led to show any sign of the removal and affixing of the sticker on the meter during previous inspections after the sticker had been fixed onto the meter.

[44] It was no surprise therefore that the learned Judicial Commissioner did not accept the amount stated in the written statement as loss of revenue prior to 1 June 2010.

[45] It was also obvious, from the learned Judicial Commissioner's decision not to accept the amount in the written statement as *prima facie* evidence of the plaintiff's loss of revenue, that the learned Judicial Commissioner had tacitly accepted, despite the strong words used in the written judgment, the defendant's explanation on the differences in the usage of electricity in the period for which loss of revenue was claimed by the plaintiff.

[46] We had closely examined the evidence of the plaintiff's witnesses.

[47] It was manifestly clear that there was no sound basis used for the back billing. PW2, for example, claimed that the defendant could "control" electricity usage, but he clearly could only make a bare denial when asked if the difference in the readings could be the result of less paddles being used. PW2 admitted that they did not check the number of paddles being used and had no authority to inspect electrical appliances used at the premises.

[48] PW2 was shown a photograph that showed the readings were lower after the "irregularities" were normalised. He was asked why that could be so. PW2's explanation was that when the inspection was commenced, the load was high because there could be a lot of paddles being used. When the inspection was almost over, "berkemungkinan" (probably) the workers had switched off one of the paddles, thus causing the reading to drop. We found many other similar instances in the evidence of the plaintiff's witnesses of "guesswork" being used as a basis for the back billing.

[49] In our considered view, when the business activity of a consumer involves possibilities of different levels of electricity usage at different periods of time, it would be gross injustice to automatically assume that any drop in electricity usage was the result of electricity "theft".

Loss Of Revenue – Expenses Of The Pre-dawn Inspection

[50] The amount claimed in the written statement also included the expenses incurred by the plaintiff in conducting the pre-dawn inspection, including overtime charges and other expenses.

[51] PW3 either admitted that the amounts claimed in the statement for overtime payments to the officers of the plaintiff were inaccurately calculated or remained silent when it was shown to her that the calculations were inaccurate.

[52] Apart from the inaccuracies in the calculations of the overtime, learned counsel for the defendant attempted to ask the plaintiff's witnesses questions as to the reasonableness of conducting the inspection at 5am. However, those questions were disallowed by the learned Judicial Commissioner who directed that the issue be dealt with in submissions.

[53] It was not in dispute that the entry into the defendant's premises was done without a warrant from a Magistrate. It was also clear that the police officers who were present were auxiliary policemen who were there only to ensure the safety of the team. None of them was of the rank of Inspector or above.

[54] The plaintiff claimed that it had a right to conduct such pre-dawn inspection by virtue of reg. 7 of the Licensee Supply Regulations 1990, which reads as follows:

> 7. Any officer authorised by a licensee may at all reasonable times, on the production of any duly authenticated document showing his authority, enter any premises to which a supply of electricity is being given by the licensee, or by another licensee (wholly or partly) through the first-mentioned licensee's supply lines and electrical equipment, for any of the following purposes, namely:
>
> (a) inspecting any supply line or electrical equipment belonging to the licensee;
>
> (b) ascertaining the register of any electricity meter; or
>
> (c) removing inspecting or re-installing any electricity meter or installing any substitute meter.

[55] The plaintiff was a licensee under Act 447. It was neither a regulator not an enforcer. Its relationship with its customers was based on contract. Apart from the contractual rights, it was given permission (not power) to do certain acts consistent with its role as an electricity supply provider, such as the ability, under reg. 7 as quoted above, to enter premises to which supply is given by it, "at all reasonable times".

[56] The learned Judicial Commissioner in his written judgment had the following to say:

> … If I were to accept the Defendant's argument that inspection cannot be done at 5.00 am, then any meter tampering *(sic)* during these hours, which the Defendant considers unreasonable, will be beyond the reaches of the Plaintiff and the law. Surely, this court cannot restrict the rights of the Plaintiff to carry out inspection of its meter panels during late night or early morning hours. The inspections by the Plaintiff and the reasonableness of its officers' conduct must be examined and construed on a case by case basis. In this regard, I do not find the conduct of the investigation to be anything but proper …

[57] While we did not disagree that reasonableness was subjective and must be construed on a case by case basis, we were of the considered view that entry into a consumer's premises in the wee hours of the morning when no operational activity was going on was clearly not entry at a reasonable time. PW2 in fact used the term "ambush" to describe the pre-dawn inspection. An "ambush" is the domain of enforcement officers – which PW1 and PW2 and their men were not. This was not a factory where operations might be conducted throughout the day and at night.

[58] Regulation 7 as it was at the material time did not, and was clearly not intended to, permit any activity of enforcement or "ambush". It merely authorised an officer of a licensee to enter a consumer's premises to do only the following three acts:

(a) to inspect any supply line or electrical equipment belonging to the licensee;

(b) to ascertain the reading registered by any electricity meter installed in the premises;

(c) to remove, inspect or re-install any electricity meter or to install a substitute meter.

[59] Enforcement functions, such as the detection of the commission of offences under Act 447, including offences under s. 37, have been expressly conferred by the Act on the persons clearly set out in the Act. These persons do not include officers of a licensee or officers authorised by a licensee. This must be so as a licensee is itself liable to have the penal provisions of the Act enforced against it, as can be seen, for example, from the provisions of subss. 37(6) and 37(7) of the Act.

[60] Section 4A of Act 447 empowers the Minister to authorise "any public officer or officer of the Commission" to exercise the powers of enforcement under the Act. These authorised officers and police officers not below the rank of Inspector are the only persons who are authorised by the Act to perform enforcement functions.

[61] Subsection 5(2) of Act 447 makes it clear that for entry into premises other than at a reasonable time, even by these enforcement officers, a warrant issued by a Magistrate is required. The only exception to the requirement for a warrant is when the enforcement officer "has reasonable grounds for believing that by reason of delay in obtaining a search warrant, any article, thing, book, document, installation or part thereof used to commit or to be used to commit an offence under this Act is likely to be removed or destroyed".

[62] In our considered view, given the clear provisions of Act 447 on powers of enforcement and persons who can exercise such powers of enforcement, reg. 7, being subsidiary legislation, could not possibly be interpreted to allow officers authorised by a licensee to conduct, as stated by PW2, a pre-dawn "ambush" of the defendant's premises.

[63] We must add that the case of *Claybricks & Tiles Sdn Bhd v. Tenaga Nasional Bhd* referred to us by the plaintiff dealt with the right of a licensee to disconnect electricity supply to a consumer's premises. It did not deal with the issue of reg. 7.

[64] As the pre-dawn inspection by the plaintiff's officers was clearly not permitted by the Act, any claim for expenses in the form of their overtime charges and other expenses involved in conducting the inspection would be, in our considered view, contrary to the intention of Act 447 and *ultra vires* the Act.

[65] In the circumstances, as the overtime charges and other expenses for the pre-dawn inspection were included in the total amount claimed in the written statement, we were of the considered view that the learned Judicial Commissioner was correct in not accepting the written statement as *prima facie* evidence of the amount that had to be paid by the defendant.

Conclusion

[66] Having examined the pleadings and the witness statements and notes of proceedings, it was clear to us that the plaintiff was relying solely on the written statement as the basis of its claim. When the learned Judicial Commissioner (correctly, in our view) impliedly rejected that written statement, the basis for the plaintiff's claim failed.

[67] Hence, the order made for damages to be assessed and the order for aggravated damages were without basis and must be set aside.

Decision

[68] Based on the analysis set out above:

(a) We allowed the defendant's cross-appeal to the extent that it related to the plaintiff's claim and set aside the High Court order on general damages and aggravated damages;

(b) We dismissed the plaintiff's appeal; and

(c) We dismissed the defendant's cross-appeal against the dismissal of its counterclaim.

[69] We ordered costs of RM10,000 to be paid to the defendant, and ordered the deposit to be refunded to the plaintiff.